LEMBAGA TATATERTIB KUMPULAN SOKONGAN (NO. 1) JABATAN PERLINDUNGAN HIDUPAN LIAR DAN TAMAN NEGARA & ORS v. MARIANI RAMLI

COURT OF APPEAL, PUTRAJAYA
HANIPAH FARIKULLAH JCA
AZIZAH NAWAWI JCA
LEE HENG CHEONG JCA
[CIVIL APPEAL NO: W-01(A)-422-08-2019]
2 AUGUST 2021

ADMINISTRATIVE LAW: *Judicial review – Application for – Application for judicial review against decision of public authorities – Public servant dismissed from service – Absent from duty despite leave not being approved – Whether there was biasness in decision – Whether issue of biasness pleaded – Whether consequential order made following decision based on issue not pleaded ought to be set aside – Public Officers (Conduct and Discipline) Regulations 1993, reg. 38(g)*

CIVIL PROCEDURE: *Pleadings – Issues – Issues not pleaded – Application for judicial review against decision of public authorities – Public servant dismissed from service – Absent from duty despite leave not being approved – Whether issues found by judge pleaded – Whether consequential order made following decision based on issue not pleaded ought to be set aside – Rules of Court 2012, O. 53 rr. 3(2) & 7*

The respondent, a wildlife assistant in the Department of Wildlife and National Parks ('Department'), was offered to be a student researcher by the Copenhagen Zoo, Denmark. The Public Service Commission and the Department approved the respondent's secondment and the Ministry of Natural Resources and Environment ('Ministry') granted the secondment for a period of two years, from 2012 to 2014. Under the programme, the respondent was required to obtain a Bachelor of Science Degree. Accordingly, on 2013, the respondent started her studies but, when the two year secondment term expired in 2013, she sought another extension and the same was approved by the Ministry for a period of one year, from 2014 to 2015. The respondent requested for another year, *ie*, 2016, where upon the completion of the secondment period, the respondent was to report back to the Department for official duties. Since the respondent's studies had not been completed, the respondent applied for study leave starting from 2016 to 2018 to complete her studies. The Department instructed the respondent to return to work while waiting for her study leave application to be approved. However, the respondent continued to be absent from duty. Hence, the Department issued a show cause letter to the respondent and commenced disciplinary proceedings against her. The Lembaga Tatatertib Kumpulan Sokongan (No. 1) Jabatan Perlindungan Hidupan Liar dan Taman

Negara ('first appellant') later found the respondent guilty and dismissed her from service. The respondent's appeal to the Lembaga Rayuan Tatatertib Perkhidmatan Awam was unsuccessful. In the meantime, the Department had authorised the respondent to temporarily keep five white geckos and another whitehanded gecko for the purpose of conservation ('primates'). Following her dismissal, the Department sought the return of the primates. Aggrieved, the respondent commenced an application for judicial review against the decisions of the first and second appellants. In quashing the decision of the first appellant, the High Court Judge ('HCJ') held that, *inter alia*, (i) there was biasness of the Director General of the Department of Wildlife and National Parks ('fourth appellant'), noting that the show cause letter to the respondent, which contained the words 'bagi pihak Ketua Pengarah,' meant that the same was issued by the fourth appellant himself, making him the complainant; and (ii) the composition of the first appellant had violated reg. 2(2) of the Public Officers (Conduct and Discipline) Regulations 1993 ('Regulations'), in that, the complainant was the fourth appellant who sat as the Chairman of the first appellant which decided to dismiss the respondent. The HCJ further held that when the court quashed and set aside the first appellant's decision, the respondent remained a public servant and the basis for the revocation of the custody of the primates was no longer justified ('consequential order'). Hence, the present appeal. In support of the appeal, the appellants submitted that, *inter alia*, the issues of legal errors and procedural irregularities in the disciplinary proceedings above, found by the HCJ, were not pleaded in the respondent's application for judicial review and not raised in her affidavits.

Held (allowing appeal with costs; setting aside order of High Court)
Per Azizah Nawawi JCA delivering the judgment of the court:

(1) The HCJ had found that the fourth appellant, as the complainant, could not sit as the Chairman of the first appellant, and since he did, the decision of the first appellant was a nullity as it was tainted with biasness. This was not a pleaded issue and not raised in the respondent's affidavits; this was conceded by the respondent herself but the respondent submitted that since the issue was raised in the written submission, the appellants could have filed an affidavit to explain the matter. This argument was untenable as O. 53 r. 7 of the Rules of Court 2012 ('ROC') clearly provides that parties require leave of the court to file further affidavits to deal with new matters arising out of any affidavit of any other party to the application. Furthermore, since the respondent did not raise the issue of the fourth appellant being the complainant nor the issue of biasness in her affidavit, there was no legal basis for the appellants to file a further affidavit. The HCJ further committed an error of law when he decided on issues not pleaded in the grounds of the application. Order 53 r. 3(2) of the ROC provides that the grounds of the application must be stated in the statement and the statement may be amended to include new grounds under O. 53 r. 7. (paras 36-39 & 41)

(2) Regulation 24 of the Regulations is an enabling provision to take disciplinary action where the employee is absent from work. Regulation 25 further outlines the procedures to be taken, in that the 'Ketua Jabatan' is to make a report on the employee's absence from work to the relevant 'Pihak Berkuasa Tatatertib'. On the issue of biasness, the HCJ made an error in his finding that the words 'bagi pihak Ketua Pengarah' in the show cause letter meant that the same was issued by the fourth appellant himself. Section 4(2) of the Wildlife Conservation Act 2010 ('Act') provides that the fourth appellant shall have general control of officers appointed under the Act and therefore, all the administrative acts will be conducted in the name of the fourth appellant. (paras 48 & 50)

(3) In view of the finding that the HCJ had committed an appealable error in quashing the dismissal decision by the first appellant, the consequential order was no longer relevant. When the respondent was dismissed from the Department, the authorisation for the respondent to care and rehabilitate the primates, under s. 50 of the Act, was also revoked. Section 50 of the Act empowers the fourth appellant to grant authorisation to any officer of the Department. The discretionary power of the fourth appellant, under s. 50 of the Act, is purely administrative or an executive function which involves technical and policy considerations of the Department. It is up to the Department, having considered internal policies, considerations and requirements, to decide which officers are to be authorised to do the conservation works under s. 50 of the Act. The court was not in any position to have the necessary technical information or policies of the Department. The HCJ erred in law and in fact in deciding to step into the shoes of the fourth appellant by reinstating the authorisation to the respondent. Since the respondent was no longer an officer of the Department, s. 50 of the Act no longer applied. (paras 51, 56, 58, 62, 63)

Case(s) referred to:

CIMB Bank Bhd v. Sebang Gemilang Sdn Bhd & Anor [2018] 5 CLJ 129 FC ***(refd)***

Dr A Dutt v. Assunta Hospital [1981] 1 LNS 5 FC ***(refd)***

Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia [2013] 2 CLJ 1009 FC ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Ghazi Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 CLJ 333 SC ***(refd)***

Hajjah Halimatussaadiah Haji Kamaruddin v. Public Services Commission, Malaysia & Anor [1994] 3 CLJ 532 SC ***(refd)***

Kerajaan Malaysia & Ors v. Tay Chai Huat [2012] 3 CLJ 577 FC ***(refd)***

Mak Sik Kwong v. Minister Of Home Affairs, Malaysia [1975] 1 LNS 96 HC ***(refd)***

Mohamed Ashraff & Anor v. The Commissioner For Federal Capital, Kuala Lumpur & Anor [1972] 1 LNS 89 FC ***(refd)***

Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu [2008] 6 CLJ 573 FC ***(refd)***
Tuan Sarip Hamid & Anor v. Patco Malaysia Bhd [1995] 3 CLJ 627 SC ***(refd)***
Zainal Hashim v. Government Of Malaysia [1979] 1 LNS 132 PC ***(refd)***

Legislation referred to:
Public Officers (Conduct and Discipline) Regulations 1993, regs. 2(2), 3, 24, 25(1), 38(g)
Rules of Court 2012, O. 53 rr. 3(2), 7
Wildlife Conservation Act 2010, ss. 4(2), 50

For the appellants - Shahmin Amiza; SFC
For the respondent - Jessica Binwanis, Devana & Ramithra; M/s Theiva Lingam

[Editor's note: For the High Court judgment, please see Mariani Ramli lwn. Lembaga Tatatertib Kumpulan Sokongan (No. 1) Jabatan Perlindungan Hidupan Liar Dan Taman Negara & Yang Lain [2020] 1 CLJ 109 (overruled).]

Reported by Najib Tamby

JUDGMENT

Azizah Nawawi JCA:

Introduction

[1] This is an appeal against the decision of the learned High Court Judge dated 10 July 2019. The learned judge has held that the respondent had violated reg. 24 of the Public Officers (Conduct and Discipline) Regulations 1993 ("1993 Regulations"), which states that a public officer who fails to turn up for duty without prior leave would result in disciplinary action being taken against the officer. In the present case, the respondent was absent from work for fifty seven (57) days and at the conclusion of the disciplinary proceedings, the respondent was dismissed from service by the first appellant and her appeal was dismissed by the second appellant.

[2] However, the learned judge then held that based on the show cause letter dated 12 October 2016 (exh. "MR19"), the composition of the first appellant had violated reg. 2(2) of the 1993 Regulations, in that the complainant against the respondent was the fourth appellant, who had sat as the Chairman of the first appellant which decided to dismiss the respondent. The learned judge then quashed the decision of the first appellant due to biasness of the fourth appellant.

[3] Having considered the appeal records and the submissions of the parties, both written and oral, we find that there are merits in the appeal and the appeal is allowed with costs.

The Salient Facts

[4] The respondent had applied for and was appointed as a Grade G19 Wildlife Assistant in the Department of Wildlife and National Parks ("Department") on 29 May 2007. She was subsequently confirmed in her post with the department.

[5] In February 2012, the respondent was offered to be a student researcher for the Flatheaded Cat Conservation Programme ("FCC Programme") by the Copenhagen Zoo, Denmark. After a series of discussions with the department, by a letter dated 27 August 2012, the third appellant, the Public Service Commission ("PSC"), approved the release for the respondent's secondment for the FCC Programme. Under the FCC Programme, the respondent was stationed at Krau Reserve Protection Unit, Sungai Dusun Reserve, Selangor and Universiti Sains Malaysia.

[6] *Via* a letter dated 10 September 2012, the department had also approved the appellant's secondment. Similarly, the Ministry of Natural Resources and Environment had granted the secondment for a period of two years (2012 to 2014).

[7] However, the respondent had signed a contract of employment with the Copenhagen Zoo for a period of four years, from 1 October 2012 to 30 September 2016.

[8] The respondent states that under the terms of the FCC Programme, the respondent was to obtain a Bachelor of Science (BSc) degree. Accordingly, on 1 September 2013, the respondent had started her studies at Universiti Kebangsaan Malaysia ("UKM") to obtain the relevant degree. All the tuition fees will be covered by the employer, Copenhagen Zoo.

[9] When the two year secondment term expired on 30 September 2013, the respondent sought for another extension. The application for extension was approved by the Ministry *vide* a letter dated 11 February 2015 for a period of one year, from 1 October 2014 to 30 September 2015. On the respondent's further request, the period was extended for another year to 30 September 2016. Upon the completion of the secondment period, the respondent was to report back to her department for official duties. The respondent was supposed to report back for duties on 3 October 2016.

[10] However, the respondent's studies at UKM has not been completed, and the respondent was to complete another two semesters. Hence, *vide* a letter dated 21 September 2016 (exh. "MR15") to the department, the respondent has applied for study leave with half salary starting from 1 March 2016 to 30 January 2018 to complete her studies.

[11] In relation to the respondent's study leave application, the department has provided an explanation on the study leave application process and the respondent had been asked to return to work while waiting for the respondent's leave to be approved.

[12] However, the respondent was absent from duty even though the respondent's leave application has not been approved. Hence, a show cause letter dated 12 October 2016 (exh. "MR19") was issued to the respondent by the department, which reads as follows:

Surat Tunjuk Sebab Tidak Hadir Bertugas Dan Arahan Kembali Bertugas Serta Merta

Dengan hormatnya saya diarah merujuk kepada perkara yang tersebut di atas dan emel dari Jabatan kepada puan bertarikh 4 Oktober 2016 adalah berkaitan.

2. Dimaklumkan bahawa Jabatan telah mengarahkan puan untuk kembali bertugas di Ibu Pejabat Jabatan PERHILITAN setelah tempoh peminjaman dengan Copenhagen Zoo tamat pada 30 September 2016. Permohonan puan untuk Cuti Belajar Separuh Gaji pada 22 September 2016 tidak dapat diproses tanpa puan melaporkan diri ke Jabatan terlebih dahulu. Dimaklumkan juga Jabatan telah memberi kelonggaran kepada puan untuk ditempatkan secara pentadbiran di Bahagian Konservasi Biodiversiti, Ibu Pejabat bagi memudahkan puan meneruskan pembelajaran sementara menunggu proses cuti yang berkelayakan bagi puan.

3. Walaubagaimanapun, puan didapati tidak hadir bertugas setelah tamat tempoh peminjaman. Oleh yang demikian, puan diarah untuk mengemukakan sebab yang munasabah di atas ketidakhadiran puan bermula 3 Oktober 2016 sehingga surat ini ditandatangani dalam tempoh tiga (3) hari dan puan juga diarah untuk kembali bertugas serta merta.

Sekian, terima kasih.

"BERKHIDMAT UNTUK NEGARA"

Saya yang menurut perintah,

(sgd)

(Priscilla Bong Anak Samson Onggie)
Bahagian Khidmat Pengurusan
b.p Ketua Pengarah
Jabatan Perlindungan Hidupan Liar
Dan Taman Negara (PERHILITAN)

[13] In response to the show cause letter, in a letter dated 17 October 2016 (exh. "MR20"), the respondent, *inter alia*, said this:

Maklum balas Surat Tunjuk Sebab Tidak Hadir Bertugas Dan Arahan Kembali Bertugas Serta Merta

…

07. Dengan sebab-sebab di atas saya mengambil keputusan untuk tidak melaporkan diri, tidak hadir bertugas dan terus menghadiri kelas sehingga permohonan cuti tanpa gaji saya berjaya diluluskan oleh pihak atasan, atau sehingga perkara ini boleh diketengahkan kepada pihak lain yang berkuasa mengadili …

[14] The department commenced disciplinary proceedings under the 1993 Regulations against the respondent by issuing the letter dated 20 January 2017 (exh. "MR21"), which reads, *inter alia*, as follows:

Tindakan Tatatertib Dengan Tujuan Buang Kerja Atau Turun Pangkat

Bahawa satu laporan telah diterima oleh Pengurusi Lembaga Tatatertib yang menyatakan bahawa puan, Mariani binti Ramli (K.P: 860805-49-5654), Pembantu Hidupan Liar Gred G19, yang bertugas di Pejabat PERHILITAN Pusat Konservasi Gajah Kebangsaan (PKGK), Kuala Gandah, Pahang telah berkelakuan yang melanggar tatakelakuan di bawah Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 dan membolehkan tindakan tatatertib diambil terhadap puan.

2. Pengerusi Lembaga Tatatertib, setelah menimbang segala maklumat yang diterima, berpendapat bahawa puan patut dikenakan tindakan tatatertib dengan tujuan buang kerja atau turun pangkat di bawah Peraturan 37, Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 atas pertuduhan berikut:

Pertuduhan

Bahawa puan, Puan Mariani Binti Ramli (K.P.: 860805-49-5654), Pembantu Hidupan Liar Gred G19 semasa bertugas di Pejabat PERHILITAN Pusat Konservasi Gajah Kebangsaan (PKGK), Kuala Gandah, Pahang telah melakukan kesalahan gagal melapor diri dan tidak hadir bertugas tanpa terlebih dahulu memaklumkan atau memohon cuti atau mendapatkan kebenaran terlebih dahulu atau tanpa sebab-sebab yang munasabah sebanyak lima puluh tujuh (57) hari sebagaimana tarikh-tarikh seperti berikut:

		Tahun 2016	
Bil.	**Bulan**	**Tarikh**	**Bil. Hari**
1.	Oktober	4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28 dan 31	20
2.	November	1, 2, 3, 4, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 28, 29 dan 30	22
3.	Disember	1, 2, 5, 6, 7, 8, 9, 13, 14, 15, 16, 19, 20, 21 dan 22	15
		Jumlah Keseluruhan	57

Perbuatan puan ini boleh menyebabkan puan dikenakan tindakan tatatertib selaras dengan Peraturan 24, Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 dan boleh diertikan sebagai tidak bertanggungjawab dan ingkar perintah atau berkelakuan dengan apa-apa cara yang boleh ditafsirkan dengan munasabah sebagai ingkar perintah

iaitu bertentangan dengan Peraturan 4(2)(g) dan Peraturan 4(2)(i), Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 seperti berikut:

Peraturan 4(2) Seseorang tidak boleh:

(g) tidak bertanggungjawab;

(i) ingkar perintah atau berkelakuan dengan apa-apa cara yang boleh ditafsirkan dengan munasabah sebagai ingkar perintah …

[15] The respondent made her representation by a letter dated 8 February 2017 (exh. "MR22"), which reads, *inter alia*, as flows:

Tindakan Tatatertib Dengan Tujuan Buang Kerja Atau Turun Pangkat

…

6) Saya mengambil keputusan untuk terus hadir kelas seperti biasa dan menjawab surat tunjuk sebab tidak hadir bertugas dan arahan kembali bertugas serta merta pada 17 Oktober 2016. Dalam surat tersebut, saya telah menjelaskan secara terperinci masalah yang saya hadapi sekiranya saya melapor diri dan hadir bekerja seperti biasa.

7) Pada 29hb Disember 2016, saya telah dipanggil dan berjumpa dengan En. Hasnan bin Yusop iaitu Timbalan Pengarah II, dan saya telah memberi sebab dan penjelasan yang sama sebelum ini.

8) Memandangkan pihak Jabatan enggan memberikan penyelesaian dan berkeras dengan tindakan memaksa seorang pekerja bawahan untuk menggagalkan pelajaran pekerjanya yang kembali ke Jabatan selepas 4 tahun peminjaman yang cemerlang, saya akan berbincang dengan peguam untuk tindakan selanjutnya selepas keputusan representasi ...

[16] On 26 April 2017, the first appellant, the Lembaga Tatatertib Kumpulan Sokongan (No. 1) Jabatan Perlindungan Hidupan Liar dan Taman Negara ("Lembaga Tatatertib") discussed and considered the disciplinary charges against the respondent and the respondent was found guilty of the disciplinary charges and was sentenced to dismissal in accordance with reg. 38(g) of the 1993 Regulations. The respondent was notified of the decision *vide* a letter dated 5 May 2017.

[17] The respondent then appealed to the second appellant, the Lembaga Rayuan Tatatertib Perkhidmatan Awam ("Lembaga Rayuan"), against the decision of the Lembaga Tatatertib. However, the Lembaga Rayuan had dismissed the respondent's appeal and affirmed the decision of the Lembaga Tatatertib. Hence, the respondent was dismissed from service.

[18] In the meantime, *vide* a letter dated 9 August 2016, the department had authorised the respondent to "menyimpan sementara" five white geckos and another whitehanded gecko for the purpose of conservation (the "primates"). The respondent was also informed that she should return the said geckos when directed by the department. After the dismissal of the respondent from service, the department issued a letter dated 11 December 2017 to the respondent to return the primates to the department.

[19] Being aggrieved by the decision of the first and the second appellants, the respondent has filed this application to review and to quash the decisions of the Lembaga Tatatertib and the Lembaga Rayuan.

[20] In the judicial review application, the respondent was seeking the following orders:

(i) an order of *certiorari* to quash the decision of the Lembaga Tatatertib dated 26 April 2017 in finding the respondent guilty of the disciplinary charge and the sentence of dismissal under reg. 38(g) of the 1993 Regulations;

(ii) an order of *certiorari* to quash the decision of the Lembaga Rayuan dated 11 September 2017 in dismissing the respondent's appeal and affirming the decision of the Lembaga Tatatertib;

(iii) an order of *certiorari* to quash fourth appellant's decision dated 11 December 2017 cancelling and/or revoking the previous authorisation granted to the respondent under s. 50 of the Wildlife Conservation Act 2010 ("Act 716") to continue to keep, care for and rehabilitate the primates for the purpose of carrying on with a conservation activity; and

(iv) an order of *mandamus* for reinstatement to her previous position as Grade G19 Wildlife Ranger and that the respondent be authorised under s. 50 of Act 716 to continue to keep, care for and rehabilitate the seven primates for the purpose of carrying on with a conservation activity.

[21] On 10 July 2019, the learned High Court Judge has allowed the respondent's application.

Decision Of The High Court

[22] The respondent had raised several issues before the High Court. The first issue raised was the issue of legitimate expectation, where the respondent submitted that she has a legitimate expectation that her application for leave should have been approved by the department on the basis that when the respondent had raised this issue with a senior official of the department, En Hasnan Yusof, Deputy Director General II, En Hasnan had promised that he would find a solution regarding the applicant's leave to continue his studies at UKM.

[23] However, the learned judge found that En Hasnan was not the head of the respondent's department or the person who has the authority to approve the respondent's leave. Added to that, the learned High Court Judge has held that the issue of legitimate expectation does not arise as all the parties knew that the loan to the Copenhagen Zoo was only for two years with an extension of two years subsequently, and that the loan period had expired on 30 September 2016. Hence, the respondent was required to report back to her department. Added to that, reg. 24 of the 1993 Regulations requires leave to be obtained first from the department concerned before a civil servant can be absent from duty. In the present case, the respondent had failed to turn up for work without the requisite approval.

[24] The next issue raised by the respondent was that the disciplinary charges were vague and defective. The learned judge held that the charges were not vague as the subject matter relates to the respondent's absence from work for fifty seven days and in her representation, the respondent had given all the reasons in detail as to why she was absent from work for fifty seven days.

[25] The respondent had also raised the issue that no Committee of Inquiry was established by the Board before she was dismissed from service. The learned judge applied established principles that a Committee of Inquiry is not a mandatory requirement under the 1993 Regulations but will only be held if further clarification is required by the Board. The judge then held that based on the evidence in this case, further clarification is no longer required when the Board has made a decision after examining the case against the applicant, including the respondent's letter of representation dated 8 February 2017.

[26] On the issue that the respondent was denied on an oral hearing, the learned judge has applied the cases of *Kerajaan Malaysia & Ors v. Tay Chai Huat* [2012] 3 CLJ 577; [2012] 3 MLJ 149; *Hajjah Halimatussaadiah Kamaruddin v. Public Services Commission, Malaysia & Anor* [1994] 3 CLJ 532; [1994] 3 MLJ 61; *Ghazi Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 CLJ 333; [1994] 2 MLJ 114; and *Zainal Hashim v. Government Of Malaysia* [1979] 1 LNS 132; [1979] 2 MLJ 276, which established the principle that an oral hearing may be given in instances where the disciplinary authority considers that the case against the officer requires further clarification and consequently appoint a Committee of Inquiry. However, if the disciplinary authority considers that no further clarification is required, the officer concerned cannot insist or demand that a Committee of Inquiry be appointed for the purposes of an oral hearing. The learned judge then dismissed this ground of the judicial review application.

[27] The issue of delay raised by the respondent was also dismissed by the learned judge, who held that on the factual matrix of this case, a period of three months before the commencement of the disciplinary action is not an unreasonable delay.

[28] The learned judge, however, allowed the respondent's application and quashed the decision of the SPA on the basis of illegality and biasness, based on the composition of the Lembaga Tatatertib. The learned judge held that under reg. 2(2) of the 1993 Regulations, any member of the Lembaga Tatatertib (including the Chairman) must not be a complainant in the disciplinary proceedings.

[29] Since the show cause letter dated 12 October 2016 was signed by Mrs Priscilla Bong on behalf of the Director General of the Department, then the complainant is the Director General of the Department, Dato' Abdul Kadir ("DG"). Hence, since Dato' Abdul Kadir was also the Chairman of the Lembaga Tatatertib who decided the respondent's case to be dismissed, this is contrary to reg. 2(2) of the 1993 Regulations.

[30] The learned judge also allowed the prayer for the release of the primates that were under the care of the respondent when she was an officer with the department. The learned judge held that when the court quashed and set aside the Lembaga Tatatertib's decision, then the respondent remained a public servant and the basis for the revocation of the custody of the primates was no longer justified.

[31] Against the above decision, the appellants have filed their appeal and there is no cross-appeal filed by the respondent against the findings of the learned trial judge.

Findings Of This Court

[32] The central feature of appellate intervention is trite, that is, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. This had been explained by the Federal Court in the case of *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1, where the Federal Court held as follows:

> [14] In our view, the *Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention, ie to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence.* In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing,

> weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention, ie that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test. (emphasis added)

[33] In another case, the Federal Court in *CIMB Bank Bhd v. Sebang Gemilang Sdn Bhd & Anor* [2018] 5 CLJ 129; [2018] 3 MLJ 689 held as follows:

> [38] The issue of knowledge of the equitable assignment is entirely a question of facts. Both the courts below concluded that the appellant had knowledge of the equitable assignment based on the facts and circumstances of the case. *It is trite law that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its judicial decision or there has been no or insufficient judicial appreciation of evidence* (see *Gan Yook Chin (P) & Anor v. Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1). (emphasis added)

[34] Bearing in mind the above cases, we will now deal with the issues raised by the parties. Since the respondent did not file any cross-appeal against the other findings of the learned judge, this court will only deal with the two issues which the learned judge decided against the appellants, namely:

(i) composition of the Lembaga Tatatertib; and

(ii) consequential order for the release of the primates that were under the care of the respondent.

[35] In their written submission, on the issue of composition of the Lembaga Tatatertib, the respondent had submitted that since the DG was the complainant in this case, then the decision of the Lembaga Tatatertib is tainted by bias as the DG was also sitting as the Chairman of the Lembaga Tatatertib. On the issue of the primates, the respondent has submitted that the primates must be returned to the respondent as a consequence of her reinstatement as an officer of the department and that this decision is in the best interests of the primates.

Composition Of The Lembaga Tatatertib

[36] The learned judge made a finding that there were legal errors and procedural irregularities in the disciplinary proceedings that tainted the decision of the Lembaga Tatatertib that warrants it to be quashed. This is based on the learned judge finding that based on the show cause letter dated 12 October 2016, the fourth appellant, the DG, was the complainant in this case. Since the DG was the complainant, therefore he cannot sit as the Chairman of the Lembaga Tatatertib. As the DG had acted as the Chairman of the Lembaga Tatatertib, the decision of the Lembaga Tatatertib is a nullity as it is tainted with biasness.

[37] The first complaint raised by the appellants is that this is not a pleaded issue in the application for judicial review and was also not raised in the affidavits. In her oral submission, learned counsel for the respondent had graciously conceded that this issue was not raised in the affidavits, nor in the application itself. This issue was only raised during the submissions before the learned judge.

[38] However, learned counsel for the respondent further submitted that since this issue was raised in the written submission, the appellants could have filed an affidavit to explain the matter. We find that this argument is untenable as O. 53 r. 7 of the Rules of Court 2012 ("ROC 2012") clearly provides that parties require leave of the court to file further affidavits to deal with new matters arising out of any affidavit of any other party to the application. Order 53 r. 7 reads as follows:

> Amendment (O. 53 r. 7)
>
> (1) **The Judge** may allow the statement to be amended, and **may allow further affidavits to be used if they deal with new matters arising out of any affidavit of any other party to the application,** and where the applicant intends to amend his statement or use further affidavits, he must immediately give notice of his intention and of any proposed amendment of his statement to every other party. (emphasis added)

[39] Added to that, since the respondent did not raise the issue of the DG being the complainant nor the issue of biasness in her affidavit, there is no legal basis for the appellants to file a further affidavit.

[40] As such, we find that the learned judge fell into error when he made a finding that the appellants have failed to explain that Mrs Priscilla Bong had signed the show cause letter on behalf of the DG in para. [36] of the judgment, and it reads:

> [36] There was no affidavit evidence from Mrs Priscilla Bong who signed the show cause letter on behalf of the Director General explaining that although the letter was signed on behalf of the Director General, it was common practice and the Director General had no knowledge of the facts of the case including complaints made when the show cause letter the reason is removed.

[41] We are also of the considered opinion that the learned judge has committed an error of law when he decided on issues not pleaded in the grounds of the application. Order 53 r. 3(2) of the ROC 2012 provides that the grounds of the application must be stated in the statement and the statement may be amended to include new grounds under O. 53 r. 7. Order 53 r. 3(2) reads:

(2) An application for leave must be made *ex parte* to a Judge in Chambers and must be supported **by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought,** and by affidavits verifying the facts relied on.

(emphasis added)

[42] The issue of raising a ground not pleaded in the statement of the judicial review application was considered by the Federal Court in *Dr A Dutt v. Assunta Hospital* [1981] 1 LNS 5; [1981] 1 MLJ 304, where Justice Chang Min Tat FJ (as he then was) held at p. 309:

There appears therefore to have been a complete disregard of the procedure prescribed and to be followed by the solicitors for the hospital. No point was however taken by counsel for Dr Dutt at any stage of the proceedings. We have however mentioned them not merely to draw attention to the fact that the new rules, the Rules of the High Court 1980, continue largely the same practice, O. 53 r. 1(2) requiring such a statement, rule 1A limiting the time for such an application, now, to six weeks of the order sought to be quashed and rule 3(1) providing that subject to the discretion of the court, **no grounds shall be relied upon and no reliefs sought except those set out in the statement.** We have done so also because the same solicitors had previously filed such a statement in its application for prohibition and **because as will be seen, this amorphous application enabled the hospital to roam at large, well outside its proper confines.** (emphasis added)

[43] Justice Chang Min Tat FJ added that the High Court should not have resorted to the affidavit for the grounds on which the application was brought, as the rule was clear that all grounds had to be set out in the statement.

[44] As in a writ action or an application by originating summons, the general rule is that the parties are bound by their pleaded case. The same principle applies to an application for judicial review, where the applicant must state the grounds of the application in the statement pursuant to O. 53 r. 3(2) of the ROC 2012. The statement may be amended to include new grounds under O. 53 r. 7 of the ROC 2012. Therefore, the applicant is confined to the grounds in the statement, which have been verified by the facts in the affidavits. As such, to allow the respondent to submit on a new ground of biasness, which was not set out in the statement and not verified in the affidavits, is prejudicial to the appellants.

[45] In *Tuan Sarip Hamid & Anor v. Patco Malaysia Bhd* [1995] 3 CLJ 627; [1995] 2 MLJ 442 the Supreme Court held that the grounds and the affidavits must present a complete picture of the case of the applicant:

A Having said that, we would add that it is a counsel of prudence for a lawyer drafting his application under O. 53 r. 1(2) *to ensure that it contains substantial particulars of the facts and matters on which he intends to rely in support of his application.* He should also ensure that his affidavit in support of his application is as detailed and comprehensive as the circumstances will permit, and it should exhibit all the documentary exhibits which are truly
B relevant and upon which he intends to rely. *The object of these steps in to ensure that the Court has as complete a picture as is possible right from the start, of the case for the applicant who is seeking judicial review.* (emphasis added)

[46] We are of the considered opinion that the statement and the affidavit of the applicant play important roles in the substantive application for an
C order of *certiorari*, declaration and *mandamus*. We find that the law clearly provides that at the hearing of the substantive application, the court will not allow the applicant to rely on any grounds not set out in the statement. As such, we are of the considered opinion that the learned judge had committed an appealable error when he decided to allow the respondent's application
D based on a ground not pleaded in the statement and was not verified by affidavit evidence. We, therefore, allow the appeal and set aside the decision of the learned judge.

[47] Be that as it may and in any event, the DG has affirmed an affidavit to state that the Lembaga Tatatertib has complied with the 1993 Regulations:

E Saya adalah Ketua Pengarah, Jabatan Perlindungan Hidupan Liar dan Taman Negara dan juga Pengerusi Lembaga Tatatertib Kumpulan Sokongan (No. 1) Jabatan Perlindungan Hidupan Liar dan Taman Negara.

F 2. Selanjutnya, kertas pertimbangan tindakan tatatertib terhadap Pemohon telah disediakan oleh Unit Integriti Responden Keempat dan telah diserahkan kepada Pengerusi Lembaga Tatatertib Kumpulan Sokongan (No. 2) Jabatan Perlindungan Hidupan Liar dan Taman Negara.

G 3. Pengerusi Lembaga Tatatertib Kumpulan Sokongan (No. 2) Jabatan Perlindungan Hidupan Liar dan Taman Negara telah membuat keputusan tatatertib terhadap Pemohon di bawah peraturan 35, Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993.

H 4. Pada mesyuarat bertarikh 26.4.2017, Responden Pertama telah memutuskan bahawa Pemohon dikenakan hukuman "buang kerja" mengikut peraturan 38(g), Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 berkuatkuasa pada 26.4.2017 iaitu tarikh Mesyuarat Lembaga Tatatertib Kumpulan Sokongan (No. 1) Jabatan Perlindungan Hidupan Liar dan Taman Negara bermesyuarat.

I (Sesalinan Minit Mesyuarat Lembaga Tatatertib Kumpulan Sokongan (No. 1) bertarikh 26.4.2017 dirujuk sebagai Ekshibit 'AK-1').

[48] Regulation 24 of the 1993 Regulations is an enabling provision to take disciplinary action where the employee is absent from work. Regulation 25 outlines the procedures to be taken, in that the "Ketua Jabatan" is to make a report on the employee's absence from work to the relevant "Pihak Berkuasa Tatatertib". A

[49] In the present case, the DG has averred that the Integrity Unit of the Department has prepared the report under reg. 25(1). Even though reg. 25(1) refers to "Ketua Jabatan" or Head of Department, it does not mean the DG himself, ie, the fourth appellant, as reg. 3 (interpretation provision) provides a wide interpretation to the term "Ketua Jabatan" or Head of Department and it reads: B C

> "Head of Department" means an officer who is in charge of a ministry, department, institution, agency or unit and includes any officer in the Top Management Group and the Managerial and Professional Group who is duly authorized in writing by the officer in charge of the ministry, department, institution, agency or unit to act on his behalf; D

[50] On the issue of biasness, the learned judge has made an error in his finding that from the words "bagi pihak Ketua Pengarah" in the show cause letter dated 12 October 2016, it means that the show cause letter was issued by the DG himself. As this issue was not pleaded nor raised in the affidavits, we can only rely on sub-s. 4(2) of Act 716, which provides that the DG shall E have general control of officers appointed under the Act, and therefore all the administrative acts will be conducted in the name of the DG. Therefore, without the requisite affidavit evidence or explanations, it is wrong for the learned judge to conclude that the DG was the complainant based on the show cause letter alone. F

Release Of The Primates

[51] In view of our finding that the learned judge has committed an appealable error in quashing the dismissal decision by the Lembaga Tatatertib, the consequential order is no longer relevant. However, for the sake of completeness, we will deal with this issue as well. G

[52] Following the decision to allow judicial review by the respondent, the learned judge then dealt with the consequential issue regarding the custody of the primates under the care of the respondent before her dismissal from service. In paras. [45] and [46] of the judgment, the learned judge made the H following findings:

> [45] Here, I find the basis of the withdrawal of the power of care of such primates under s. 50, the Wildlife Conservation Act 2010 is because the applicant is no longer a civil servant when the applicant is dismissed through a decision of the Board. I

A [46] Therefore, further, the decision to withdraw the custody of the primates was also set aside. These results also take into account the importance of the primates.

[53] The respondent took the position that the department's decision dated 11 December 2017 to revoke the consent given to the respondent to care for
B and rehabilitate the primates is unreasonable, unjust, perverse and irrational as the department does not have any expertise nor any budget to look after these primates. The respondent that she had taken the initiative to study various international guidelines on the rehabilitation of wild animals prior to receiving the primates to care for and to rehabilitate.

C **[54]** However, these assertions by the respondent had been disputed by the department. In his affidavit, the DG averred that:

58. Merujuk perenggan 72(a) Afidavit Sokongan Pemohon, penyataan tersebut adalah dinafikan. Selanjutnya, dinyatakan bahawa Responden Keempat tidak pernah memberikan sebarang pengiktirafan berkenaan
D kepakaran Pemohon berhubung penjagaan dan pemeliharaan hidupan liar tersebut. Responden Keempat mempunyai pakar yang telah dilantik secara sah di bawah Akta Pemuliharaan Hidupan Liar 2010 (Akta 716).

59. Perenggan 72(b) Afidavit Sokongan Pemohon adalah dirujuk dan dinafikan. Responden Keempat meletakkan beban pembuktian yang
E kukuh kepada Pemohon untuk membuktikan penyataan tersebut. Responden Keempat menyatakan bahawa:

(a) Responden Keempat mempunyai kemudahan untuk menempatkan, menjaga, memulih dan apa juga perkara yang berkaitan dengan hidupan liar kerana Responden Keempat mempunyai Pusat
F Konservasi Hidupan Liar (PKHL), National Wildlife Rescue Centre (NWRC) dan Makmal Forensik Hidupan Liar Kebangsaan yang telah diiktiraf di peringkat antarabangsa;

(Sesalinan Laporan Tahunan 2016 Jabatan PERHILITAN Semenanjung Malaysia dan surat pengiktirafan dirujuk sebagai Ekshibit 'AK-G').

G

(b) Responden Keempat mempunyai Pakar yang telah dilantik secara sah mengikut undang-undang. Pelantikan Pakar-Pakar ini adalah berdasarkan kepada pengalaman mereka di dalam pelbagai bidang melibatkan hidupan liar;

H (Sesalinan senarai Pakar Hidupan Liar dirujuk sebagai Ekshibit 'AK-7').

(c) Responden Keempat telah menghantar pegawai-pegawai untuk menghadiri kursus yang bersesuaian termasuk latihan berkaitan hidupan liar di dalam dan di luar negara bagi meningkatkan pengetahuan dan kemahiran mereka; dan

I

(Sesalinan senarai Kursus Jabatan PERHILITAN dirujuk sebagai Ekshibit 'AK-S')

(d) Responden Keempat memperuntukkan perbelanjaan untuk pengurusan dan kebajikan hidupan liar di Semenanjung Malaysia pada setiap tahun.

[55] Be that as it may, it is common ground that the authorisation granted to the respondent to care for and rehabilitate the primates was made under s. 50 of Act 716 and it reads:

50. Hunting, etc, for the purpose of conservation

(1) Notwithstanding anything in this Act, for the purpose of carrying any conservation activity, the Director General or **any officer authorised by him** may breed, keep, hunt, import, export, sell or purchase any wildlife.

(2) "A conservation activity" means an activity that relates to the protection, management and sustainable use of wildlife.

(emphasis added)

[56] It is also not in dispute that when the respondent was dismissed from the department, the authorisation letter was also revoked. This is because s. 50 empowered the DG to grant authorisation to any officer of the department, and since the respondent was no longer an officer of the department, s. 50 no longer applies to her.

[57] The next issue then is whether the authorisation under s. 50 of Act 716 should be reinstated if the officer concerned is reinstated to her position.

[58] We are of the considered opinion that s. 50 gives the DG a discretionary power to do certain acts for the purpose of carrying any conservation activity. This power is purely an administrative or an executive function which involved technical and policy considerations of the department. It is up to the department, having considered its internal policies, considerations and requirements, to decide which officers are to be authorised to do the conservation works under s. 50 of Act 716.

[59] In the case of *Mak Sik Kwong v. Minister Of Home Affairs, Malaysia* [1975] 1 LNS 96; [1975] 2 MLJ 168, the second issue before the court is whether the respondent, in making an order of deprivation of citizenship, is performing a purely administrative or ministerial act and not a *quasi*-judicial function. Abdoolcader J (as His Lordship then was) held that an order of deprivation of citizenship is a *quasi*-judicial function and subject to review. However, His Lordship added that a purely administrative or executive function is not subject to review by the courts as these decisions involved policy considerations only:

A It would seem therefore no longer necessary to show that the function was essentially of a judicial nature (*Ridge v. Baldwin* [1964] AC 40, 74-76 *Durayappah v. Fernando* [1967] 2 AC 337) or that the person or body making the decision was under an express or even an implied duty to follow a procedure analogous to the judicial (*R v. Manchester Legal Aid Committee, Ex parte Brand (RA) & Co. Ltd.* [1952] 2 QB 413). It will be B sufficient if there is an obligation to decide questions of law or fact affecting individual rights and exercise a judicial or limited discretion. *A purely administrative or executive function is one where there is no duty to afford a hearing to the parties interested, and where the decision can be made on the basis of policy considerations only.* (emphasis added)

C **[60]** The same position was taken by the Federal Court in *Mohamed Ashraff & Anor v. The Commissioner For Federal Capital, Kuala Lumpur & Anor* [1972] 1 LNS 89; [1972] 2 MLJ 69, where the court held that:

… section 18A leaves no discretion with the commissioner upon proof of compliance with section 18A(1)(a)(b) and (c) already quoted in his D judgment. In the absence of any provision as to the mode of inquiry, we are of the view that no question of failure to observe the principles of natural justice can arise. **The commissioner's functions under section 18A appear to us to be purely administrative and any act pursuant thereto is not amenable to *certiorari*.** (emphasis added)

E **[61]** In *Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia* [2013] 2 CLJ 1009, the Federal Court held that where the subject matter before the court involves policy considerations, the said matter is not within the purview of the court. The Federal Court held that:

We would like to add that the disbursement of the Special Constituency F Allocation is a policy matter which is not within the purview of the courts. **It is our view that the courts is in no position to evaluate the qualifications in the application for the Special Constituency Allocation and to determine or decide on the policy made by the executive.** We have to take cognizance of the fact that government policies emanate after consideration of a number of technical factors which are often non-legal; G **and judges do not possess the necessary information and expertise to evaluate these non legal factors and to pass judgment on the appropriateness or adequacy of a particular policy.** (emphasis added)

[62] In the present case, this court is not in any position to have the necessary technical information or policies of the department in order to H ascertain if an officer should be authorised to breed, keep, hunt, import, export, sell or purchase any wildlife for the purpose of conservation. Therefore, if an officer is reinstated to her former post in the department, it is up to her and the department to decide if she is required to be authorised under s. 50 of Act 716 to do the conservation works. The discretion under I s. 50 rests squarely within the department.

[63] Therefore, on the issue of the learned judge's consequential order for the release of the primates to the respondent, we find that the learned judge has failed to consider that the authorisation under s. 50 rests squarely within the discretion of the department. The learned judge has erred in law and in fact when he decided to step into the shoes of the DG by reinstating the authorisation to the respondent. (See *Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu* [2008] 6 CLJ 573, (FC)).

Conclusion

[64] The respondent was dismissed from service under the 1993 Regulations because of her absence from duty for fifty seven days without approval. The learned judge had dismissed all her pleaded grounds to quash the dismissal decision. However, the learned judge allowed her application on the issue of biasness, which was not a pleaded issue in the statement or in the affidavits. Therefore, we find that the learned judge has committed an appealable error that warrants our intervention. The appeal is allowed with costs and the decision of the learned judge is set aside.